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CLERK U.S. DISTRICT COURT DISTRICT OF ARIZONA	
BY <u>[Signature]</u>	DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Sharon Newton-Nations, Manuela Gonzalez, Cheryl Bilbrey, Donald McCants, Hector Martinez, Anne Garrison, Dawn House, Dana Franklin, Edward Bonner, D.H., Jack Baumhardt, Manuel Esparza and Patricia Jones, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Anthony Rogers, Director of the Arizona Health Care Cost Containment System, and Tommy Thompson, Secretary of the United States Department of Health and Human Services, in their official capacities,

Defendants.

No. CIV 03-2506-PHX-EHC

**PRELIMINARY INJUNCTION
ORDER**

Pending before the Court is Plaintiffs' Motion for a Preliminary Injunction. [Dkt. 10]. Defendant Rodgers filed a Response on February 12, 2004. [Dkt. 22]. Defendant Thompson filed a Response on March 5, 2004. [Dkt. 32]. Plaintiffs filed Replies on February 18, 2004, and on March 10, 2004. [Dkt. 25, 38].

Background

Plaintiffs are "low income Arizona residents who receive medical assistance through Arizona's Medicaid program, the Arizona Health Care Cost Containment System("AHCCCS")." [Dkt. 19]. On March 17, 2004, the Court granted Plaintiffs'

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1 Motion for Class Certification and defined the class members as "all [AHCCCS] eligible
2 persons in Arizona who have been or will be charged copayments pursuant to Arizona
3 Administrative Code Amended Rule R9-22-711(E)."¹ [Dkt. 42](footnote not in original).

4 Defendant Tommy Thompson, named in his official capacity, is the Secretary of
5 the United States Department of Health and Human Services and is responsible for
6 administering the federal Medicaid program. [Dkt. 1; ¶ 20]. Arizona participates in the
7 federal Medicaid program² through the AHCCCS. [Dkt. 19; 32]. Defendant Anthony
8 Rodgers, named in his official capacity, is the Director of the [AHCCCS], and is
9 responsible for administering the Medicaid program in Arizona. [Dkt. 1 ¶ 21; 29 ¶ 21].

10 The AHCCCS was created in 1982 after it was approved by the United States
11 Department of Health and Human Services.³ [Dkt. 1 ¶ 28; 29 ¶ 28; 32]. In January 2001,

12
13 ¹ Amended AAC R9-22-711(E), provides:
14 Unless otherwise listed in subsection (B), (C) or (D) the following individuals are required
15 to pay the copayments listed in this subsection. The provider may deny a service if the
16 member does not pay the required
17 copayment.

18 1. An individual whose income is under 100% of the Federal Poverty Level in A.R.S. § 36-
19 2901.01, or

20 2. An individual eligible for the Medical Expense Deduction program in A.R.S. § 36-
21 2901.04.

22 Covered Services

23 Generic prescriptions or brand name prescriptions

24 if generic is not available

\$4.00 per prescription

25 Brand name prescriptions when generic is available

\$10.00 per prescription

26 Nonemergency use of the emergency room.

\$30.00 per visit

27 Physician office visit

\$5.00 per office visit

28 ² 42 U.S.C. § 1396 *et seq.*

29 ³ Plaintiffs allege and Defendant Rodgers does not dispute that AHCCCS was
30 initiated after the U.S. Department of Health and Human Services "granted Arizona an
31 'experimental, pilot, or demonstration project' waiver, pursuant to 42 U.S.C. § 1315(a)[.]"
32 [Dkt. 1 ¶ 28; 29 ¶ 28]. Defendant Thompson's argument is unclear as to his position on the
33 origin of AHCCCS. See e.g. [Dkt. 32]. However, a review of 42 U.S.C. § 1396a in light of
34 the Supreme Court's holding in Pharmaceutical Research and Mfrs. of America v. Walsh,
35 538 U.S. 644, ___, 123 S.Ct. 1855, 1861 (2003), *infra*, indicates AHCCCS was initially created
36 as a State plan within the bounds of the federal Medicaid Act. See 42 U.S.C. § 1396a; Walsh,
37 538 U.S. 644.

1 pursuant to 42 U.S.C. § 1315, Defendant Thompson granted Arizona and AHCCCS
2 permission to waive the State plan requirements listed in 42 U.S.C. § 1396a in order to
3 create a demonstration project. [Dkt. 32, Exh. 1]. The demonstration project extended
4 AHCCCS to: (1) persons who have incomes below 100% of federal poverty level; and (2)
5 persons who incur medical expenses sufficient to reduce monthly incomes to 40 percent
6 of federal poverty level. [Dkt. 19; 32]; 42 U.S.C. 1315.

7 Plaintiffs allege that on May 2, 2003, AHCCCS again sought waiver from
8 Defendant Thompson under 42 U.S.C. § 1315, to increase the copayments charged
9 Plaintiffs for medical services. [Dkt. 19]. Plaintiffs allege that Defendant Thompson
10 informed AHCCCS it did not need a waiver to increase copayments because the
11 copayment information "could be included in a new section on cost sharing to be added to
12 [AHCCCS'] financial operational protocol. The operational protocol is a document,
13 prepared by the State and approved by [Defendant Thompson], that represents all policies
14 and operating procedures applicable to the demonstration waiver." Id. (internal quotation
15 marks omitted). As a result of the information provided by Defendant Thompson,
16 Plaintiffs allege that on October 1, 2003, Defendant Rodgers, with the permission of
17 Defendant Thompson, implemented amended Arizona Administrative Code ("AAC") R9-
18 22-711(D) and (E). [Dkt. 1, ¶ 2]. Plaintiffs allege that the amended rule "requires certain
19 Medicaid-eligible Arizonans to pay copayments that exceed the limited, 'nominal'
20 copayments authorized by the federal Medicaid Act." Id. Plaintiffs further allege that the
21 amended rule "also allows health care providers to deny care and services to Medicaid
22 beneficiaries who are unable to pay the copayment, in violation of federal the Medicaid
23 Act." Id.

24 On December 19, 2003, Plaintiffs filed this Complaint against Defendant Rodgers
25 and Defendant Thompson alleging that Defendant Thompson's action authorizing Arizona
26 to implement copayments: (1) exceeded his limited authority under 42 U.S.C. § 1315 and
27 1396o; (2) failed to comport to the human protections required by 42 U.S.C. § 3515b; and
28

1 (3) that these actions were done in an arbitrary and capricious fashion. [Dkt. 1]. The
2 Complaint further alleges that Defendant Rodgers' imposition of the increased
3 copayments in AAC R9-22-711(D) and (E) are: (1) contrary to 42 U.S.C. § 1396o, and
4 preempted by the Supremacy Clause of the U.S. Constitution; (2) in violation of the Due
5 Process Clause of the Fourteenth Amendment; and (3) contrary to 42 U.S.C. §
6 1396a(a)(3). [Dkt. 1].

7 On January 26, 2004, Plaintiffs filed a Motion for a Preliminary Injunction seeking
8 to enjoin Defendant Rodgers from: (1) imposing copayments on Plaintiffs that exceed the
9 nominal amounts allowed under 42 U.S.C. §§ 1396o(a)(3), (b)(3), and 42 C.F.R. §
10 447.54; and (2) from allowing providers to deny medical services to Plaintiffs and the
11 class because of the inability of these AHCCCS participants to pay the copayments in
12 violation of 42 U.S.C. § 1396o(e). [Dkt. 19]. Plaintiffs also request that the Court not to
13 impose a bond. *Id.* This Motion is now fully briefed. *See* [Dkt. 22, 25, 32, 38, 49, 50].

14 **Preliminary Injunction Standard**

15 The Ninth Circuit has held that "[t]o obtain a preliminary injunction in the district
16 court, plaintiffs [are] required to demonstrate '(1) a strong likelihood of success on the
17 merits, (2) the possibility of irreparable injury to plaintiff[s] if preliminary relief is not
18 granted, (3) a balance of hardships favoring the plaintiff[s], and (4) advancement of the
19 public interest (in certain cases).'" *Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir.
20 2004)(quoting *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir.
21 1995)). "Alternatively, injunctive relief could be granted if the plaintiffs 'demonstrate[d]
22 *either* a combination of probable success on the merits and the possibility of irreparable
23 injury *or* that serious questions are raised and the balance of hardships tips sharply in
24 [their] favor.'" *Id.*(quoting *Johnson*, 72 F.3d at 1430)(internal quotation marks omitted).
25 "These two alternatives represent extremes of a single continuum, rather than two
26 separate tests...." *Id.*(quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340
27 F.3d 810, 813 (9th Cir. 2003)). "Thus, the greater the relative hardship to [the party
28 seeking the preliminary injunction,] the less probability of success must be shown." *Clear*

1 Channel, 340 F.3d at 813. "In cases where the public interest is involved, the district
2 court must also examine whether the public interest favors the plaintiff." Rodde, 357
3 F.3d at 994.

4 **Plaintiffs' Motion for Preliminary Injunction**

5 Plaintiffs argue that they are entitled to a preliminary injunction because: (1) they
6 are suffering irreparable harm as a result of the increased cost in medical services; (2)
7 they are likely to succeed on the merits because AAC R9-22-711(E) "clearly violates the
8 Medicaid Act's nominality requirements for copayments and the Act's prohibition against
9 allowing health care providers to deny services to those who cannot meet the
10 copayments"; and (3) that the balance of hardships strongly favors Plaintiffs because the
11 potential injury to Plaintiffs and the class members outweighs any potential injury to
12 Defendant Rodgers. [Dkt. 19].

13 On February 12, 2004, Defendant Rodgers filed his Response to Plaintiffs' Motion
14 arguing that Plaintiffs are unable to show a likelihood of success on the merits because:
15 (1) higher copayments were approved by Defendant Thompson; (2) that 42 U.S.C. §
16 1396o does not apply because it applies only to Title XIX populations, not a
17 demonstration program. [Dkt. 22]. Defendant Rodgers' Response also states that "[t]he
18 balance of hardships weighs somewhat in favor of the 13 plaintiffs, but not enough, we
19 submit, to overcome the lack of likelihood of success on the merits." Id. Plaintiffs filed a
20 Reply to Defendant Rodgers' Response on February 18, 2004. [Dkt. 25].

21 On March 2, 2004, Defendant Thompson filed his Response alleging that Plaintiffs
22 are unable to show a likelihood of success on the merits because: (1) 42 U.S.C. § 1396o
23 does not apply to Plaintiffs because they are part of an expansion population and not
24 covered under the Arizona Medicaid State plan; (2) 42 U.S.C. § 1396o(f) was not violated
25 because it does not apply to Plaintiffs; (3) 42 U.S.C. § 1396o(e) was not violated because
26 it does not apply to Plaintiffs; (4) the action in approving Arizona's demonstration
27 program was lawful and does not present a danger to the participants. Id. Defendant
28 Thompson argues that Plaintiffs are unable to demonstrate irreparable harm because: (1)

1 they are not entitled to health care services because Arizona has *chosen* to operate a
2 demonstration project that includes them; (2) that if Plaintiffs receive the relief sought, it
3 will leave some Plaintiffs worse off because the relief will deprive the AHCCCS of
4 income, causing the state to reduce the services offered; (3) that the economic loss felt by
5 Plaintiffs in the form of an increased copayment is insufficient to prove irreparable injury;
6 and (4) that Plaintiffs' arguments for a preliminary injunction are undermined because the
7 copayment challenged by Plaintiffs went into effect on October 1, 2003, and was not
8 challenged until the end of January, 2004. *Id.* Defendant Thompson further argues that
9 the balance of hardships do not tip in the favor of Plaintiffs because: (1)"enjoining
10 Arizona from collecting co-payments from AHCCCS expansion populations jeopardizes
11 the state's ability to continue providing expanded health care services for AHCCCS
12 expansion populations;" (2) "the imposition of a program-wide, state-wide injunction
13 against Arizona- and the disruption such an injunction would create- is unwarranted
14 where plaintiffs have no chance of success on the merits"; (3) that a class wide injunction
15 would be overbroad; and (4) that the public interest will not be furthered by the grant of
16 an injunction. [Dkt. 32]. Plaintiff filed a Reply on March 10, 2004, and Defendant
17 Thompson filed a Sur-Reply on April 2004. [Dkt. 38; 49].

18 1. Irreparable Injury

19 Under either of the Ninth Circuit's tests for a preliminary injunction, "the moving
20 party must demonstrate a significant threat of irreparable injury, irrespective of the
21 magnitude of the injury." Big Country Foods, Inc. v. Board of Educ. of Anchorage
22 School Dist., Anchorage Alaska, 868 F.2d 1085, 1088 (9th Cir. 1989). The Ninth Circuit
23 has found irreparable injury established by a showing that plaintiffs may be denied
24 medical care. Beltran v. Meyers, 677 F.2d 1317, 1322 (9th Cir. 1982).

25 ACC R9-22-711(E) authorizes medical service providers to deny services to
26 Plaintiffs if they are unable to pay the increased copayment. See AAC R9-22-711(E).
27 Because Plaintiffs may be denied medical care, Plaintiffs have demonstrated irreparable
28 injury. Beltran, 677 F.2d at 1322.

1 2. Balance of Hardships

2 When "[b]alancing the medical or financial hardship to the plaintiffs [] against the
3 financial hardship to the state resulting from its inability to recover for medical services
4 should its rules ultimately be held valid, it was not an abuse of discretion for the district
5 judge to find that the balance of hardships tipped sharply in favor of plaintiffs." Id.
6 Further, the Ninth Circuit has found that when "[f]aced with[] a conflict between
7 financial concerns and preventable human suffering, we have little difficulty concluding
8 that the balance of hardships tips decidedly in plaintiffs' favor." Rodde, 357 F.3d at
9 999(quoting Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983)).

10 Plaintiffs' Memorandum in Support of their Motion includes declarations from: (1)
11 twelve named Plaintiffs; (2) four class members; (3) a Case Manager with HIV Directions
12 in Maricopa County, Arizona; and (4) a Case Management Supervisor at the Central
13 Arizona Shelter Services program in Maricopa County, Arizona. [Dkt. 19]. These
14 declarations all attest to the financial plight and the serious medical conditions of
15 Plaintiffs. Id. Defendant Thompson argues in its Response that the State may suffer
16 financial hardship if the Court enjoins enforcement of AAC R9-22-711(E).⁴ However,
17 Defendant Thompson's argument is unpersuasive because Defendant Rodgers
18 implemented AAC R9-22-711(E) on October 1, 2003, after providing medical services to
19 Plaintiffs at the lower copayments since January 2001. [Dkt. 32, Exh. 1; 38]. Further, any
20 financial concerns on the part of the State are outweighed by the increased copayments
21 listed in AAC R9-22-711(E) because they require Plaintiffs to bear increased medical
22 bills and to balance those increased costs with their living expenses. See Id.; [Dkt. 19].
23 Because Plaintiffs have multiple medical costs, scarce financial resources, and due to the
24 fact that they have relied on the medical services at the previous copayment schedule

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27 ⁴ The Court notes that the State, through Defendant Rodgers, is the entity arguably
28 most familiar with its own finances. However, Defendant Rodgers has not argued that it
would face a financial burden if the Court enjoined AAC R9-22-711(E).

1 since January 2001, the balance of hardships tips sharply in the favor of Plaintiffs. See
2 Rodde, 357 F.3d at 999.

3 3. Serious Questions Raised/Likelihood of Success on the Merits

4 "Congress created the Medicaid program in 1965 by adding Title XIX to the Social
5 Security Act." Pharmaceutical Research and Mfrs. of America v. Walsh, 538 U.S.
6 644, ___, 123 S.Ct. 1855, 1861 (2003). The Medicaid program "authorizes federal
7 financial assistance to States that choose to reimburse certain costs of medical treatment
8 for needy persons. In order to participate in the Medicaid program, a State must have a
9 plan for medical assistance approved by the Secretary of Health and Human Services []." Id.
10 (citing 42 U.S.C. 1396a(b)). The State plan must define "the categories of individuals
11 eligible for benefits and the specific kinds of medical services that are covered."
12 Id. (citing 42 U.S.C. §§ 1396a(a)(10), (17)). The State "plan must provide coverage for the
13 'categorically needy' and, at the State's option, may also cover the 'medically needy.'" Id.
14 The categorically needy group includes "individuals eligible for cash benefits under the
15 Aid to Families with Dependent Children (AFDC) program, the aged, blind, or disabled
16 individuals who qualify for supplemental security income (SSI) benefits, and other low-
17 income groups such as pregnant women and children entitled to poverty-related
18 coverage." Id. fn. 4. "The 'medically needy' are individuals who meet the nonfinancial
19 eligibility requirements for inclusion in one of the groups covered under Medicaid, but
20 whose income or resources exceed the financial eligibility requirements for categorically
21 needy eligibility." Id.

22 Courts have found that "State participation in the Medicaid program is optional. If
23 a state does elect to participate, it must comply with all provisions of the federal Medicaid
24 statute and implementing regulations, except insofar as individual requirements may be
25 waived by the federal government." J.K. By and Through R.K. v. Dillenberg, 836 F.Supp.
26 694, 696 (D.Ariz. 1993). Waiver of these individual requirements is accomplished under
27 42 U.S.C. § 1315. See Beno v. Shalala, 30 F.3d 1057, 1068 (9th Cir. 1994). The Ninth
28 Circuit has held that 42 U.S.C. § 1315 must be read in context and when interpreting a

1 waiver under 42 U.S.C. § 1315, "we must, of course, 'follow the cardinal rule that a
2 statute is to be read as a whole.'" Beno, 30 F.3d at 1068(quoting Conroy v. Aniskoff, 507
3 U.S. 511, ___, 113 S.Ct. 1562, 1565 (1993).

4 The parties agree that Plaintiffs are "medically needy" under the Medicaid
5 framework. See [Dkt. 19; 32]. Reading 42 U.S.C. § 1315 as a whole, in conjunction with
6 the provisions of 42 U.S.C. § 1396 *et seq.*, and considering the arguments raised by
7 Plaintiffs and Defendants, Plaintiffs have raised serious questions and have demonstrated
8 a likelihood success on the merits as to whether or not Defendants are required to follow,
9 and if they are required follow, have they followed the procedures and guidelines set forth
10 in 42 U.S.C. § 1396 *et seq.* and 42 U.S.C. § 1315.

11 4. Public interest

12 Ninth Circuit has found that:

13 [i]t is not only the harm to the individuals involved that we must consider in
14 assessing the public interest. Our society as a whole suffers when we neglect the
15 poor, the hungry, the disabled, or when we deprive them of their rights or
16 privileges. Society's interest lies on the side of affording fair procedures to all
17 persons, even though the expenditure of governmental funds is required. It would
18 be tragic, not only from the standpoint of the individuals involved but also from
19 the standpoint of society, were poor, elderly, disabled people to be wrongfully
20 deprived of essential benefits for any period of time. It would be unfortunate, but
21 far less harmful to society, were the government to succeed in overturning the
22 preliminary injunction but be unable to recoup all or a portion of the funds.

23 Lopez, 713 F.2d at 1437-1438.

24 Although Plaintiffs' and the class' access to medical services are not being
25 terminated as they were in Lopez, AAC R9-22-711(E) does increase the copayments
26 charged Plaintiffs and allows medical service providers to deny Plaintiffs medical
27 services if they are unable to pay. See AAC R9-22-711(E). Plaintiffs' lack of financial
28 stability coupled with an increased copayment could act to deny Plaintiffs medical
services. Plaintiffs have demonstrated that the public interest is in their favor. See Rodde,
357 F.3d at 994.

The Court will grant Plaintiffs' Motion for a Preliminary Injunction. [Dkt. 10].

1 **Notice to the Class**

2 On March 19, 2004, the Court granted Plaintiffs' Motion for Rule 23(b)(2) Class
3 Certification and advised that "[t]he Court will direct notice to the class in the Court's
4 Order ruling on Plaintiffs' Motion for a Preliminary Injunction." [Dkt. 12; 42].

5 Plaintiffs' Complaint seeks declaratory and injunctive relief. [Dkt. 1].
6 Accordingly, Plaintiffs' Motion for Class Certification sought certification of the class
7 under Federal Rules of Civil Procedure, Rule 23(b)(2). [Dkt. 12]; see FED.R.CIV.P.23(b).
8 The Ninth Circuit has held that "Rule 23(c) directs certain procedural protections in a
9 class action depending upon the Rule 23(b) subsection under which the court certifies the
10 action." EEOC v. General Tel. Co. of Northwest, Inc., 599 F.2d 322, 334 (9th Cir. 1979)
11 *affirmed* 446 U.S. 318 (1980). Prior to the December 2003 amendments to Rule 23(c),
12 the Ninth Circuit found that "[w]hen an action is certified under Rule 23(b)(2). . . absent
13 class members are not required to receive notice or to have the opportunity to opt-out of
14 the suit." Id. Further, "due process requires only that the class members be adequately
15 represented. The trial court may in its discretion in a class action certified under Rule
16 23(b) (2) direct that notice be given under Rule 23(d)." Id. In addition to the Court's
17 equitable power under Rule 23(d)(2), amended Rule 23(c)(2)(A) provides that: "[f]or any
18 class certified under Rule 23(b)(1) or (2), the court may direct *appropriate notice* to the
19 class." FED.R.CIV.P.23(c)(2)(A)(amended December 2003)(emphasis added). The
20 advisory committee notes to the 2003 amendment provide in relevant part:

21
22 The authority to direct notice to class members in a (b)(1) or (b)(2) class action
23 should be exercised with care. For several reasons, there may be less need for
24 notice than in a (b)(3) class action. There is no right to request exclusion from a
25 (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for
26 formal notice. The cost of providing notice, moreover, could easily cripple actions
27 that do not seek damages. The court may decide not to direct notice after
28 balancing the risk that notice costs may deter the pursuit of class relief against the
benefits of notice.

When the court does direct certification notice in a (b)(1) or (b)(2) class action,
the discretion and flexibility established by subdivision (c)(2)(A) extend to the

1 method of giving notice. Notice facilitates the opportunity to participate. Notice
2 calculated to reach a significant number of class members often will protect the
3 interests of all. Informal methods may prove effective. A simple posting in a place
4 visited by many class members, directing attention to a source of more detailed
information, may suffice. The court should consider the costs of notice in relation
to the probable reach of inexpensive methods.

5 Fed.R.Civ.P.23(c)(2)(2003 advisory committee notes).

6 The Court will direct the parties to submit a proposal or proposals, if they cannot
7 agree, concerning the notice, if any, to be given to class members.

8 Accordingly,

9 **IT IS ORDERED** that Plaintiffs' Motion for a Preliminary Injunction [Dkt. 10] is

10 **GRANTED.** Defendant Rodgers is enjoined pending further order of Court from:

11 (1) imposing the mandatory copayments on prescription medications, doctors' visits and
12 the use of the emergency room as set forth in AAC R9-22-711(E), and (2) allowing
13 providers to deny medical services because of a participant's inability to pay the required
14 copayments set forth in AAC R9-22-711(E).
15

16 **IT IS FURTHER ORDERED** that Plaintiffs are not required to post a bond.
17

18 **IT IS FURTHER ORDERED** that within **twenty days** from the date of this
19 Order, Defendant Rodgers issue a letter to all Arizona Health Care Cost Containment
20 System providers, including pharmacies, physicians and hospitals, notifying them of the
21 preliminary injunction and that the increased copayments set forth in AAC R9-22-711(E)
22 may not be charged or collected, and that they may not deny care or services to an
23 individual eligible for such care or services on account of the individual's inability to pay
24 the increased copayment set forth in AAC R9-22-711(E).
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1 **IT IS FURTHER ORDERED** that within ten days of the date of this Order, the
2 parties are directed to submit a proposal or proposals, if they cannot agree, concerning the
3 notice, if any, to be given to class members.
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6 DATED this 20 day of April, 2004.

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9 Earl H. Carroll
10 United States District Judge
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